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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 725

PAN AMERICAN WORLD AIRWAYS, INC., PETITIONER

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1780, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

STATEMENT

The issue in this case is which of two federal labor statutes—the Railway Labor Act or the National Labor Relations Act—applies to non-transportation activities conducted by an air carrier at the Atomic Energy Commission's Nevada test site. Petitioner Pan American is an air carrier which performs housekeeping and general support functions at that site in connection with a program for the development of a nuclear rocket engine, pursuant to a contract which it entered into with the Atomic Energy Commission on June 28, 1963. Prior thereto, the work had been

done by a non-carrier contractor. The work which Pan American performs includes preventive maintenance of electrical, electronic and ventilation equipment and such technical functions as the storage and use of liquid fuel and gas. None of its work is directly related to the carrier's own transportation activities.

Petitioner instituted this suit in the district court to enjoin the respondent labor organizations and the individual respondents from striking, picketing, and otherwise directing pressure against petitioner's operations at the Nevada test site. It contends that these activities violate the Railway Labor Act. (45 U.S.C. 151, *et seq.*), which it considers applicable to the dispute. The district court denied an injunction, and the Court of Appeals for the Ninth Circuit affirmed. It held that the Railway Labor Act is inapplicable because petitioner's operations at the Nevada test site are unrelated to its transportation activities; and, accordingly, that the Norris-La Guardia Act (29 U.S.C. 101, *et seq.*) prohibits an injunction.

Both the United States and the National Labor Relations Board believe that the decision of the court of appeals is correct. The National Mediation Board, however, is of the contrary view, and it has ruled that the Railway Labor Act is applicable not only to this dispute but to a similar dispute that arose in 1956 in connection with this same carrier's similar activities at Cape Canaveral (now Cape Kennedy), Florida. Since this case involves the application of mutually-

exclusive federal labor statutes,[1] and since the agencies which administer those statutes disagree as to which applies, the United States deems it appropriate to present these divergent views to the Court, and to advise the Court of its opinion as to the importance of the question.

DISCUSSION

1. THE MERITS OF THE DECISION BELOW

The provisions of the Railway Labor Act were made applicable in 1936 to "every common carrier by air engaged in interstate or foreign commerce * * * and every air pilot or other person who performs any work as an employee or subordinate official of such carrier * * *" (45 U.S.C. 181). Such provisions apply "to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of 'carrier' and 'employee', respectively, in section 151 of this title" (45 U.S.C. 182). Section 151, First, defines "carrier" to include "any * * * carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service * * * in connection with the transportation, receipt, delivery, elevation, transfer in

[1] The definitions of employer and employee in the National Labor Relations Act exclude persons "subject to the Railway Labor Act, as amended from time to time" (29 U.S.C. 152(2), (3)).

transit, refrigeration or icing, storage, and handling of property transported by railroad * * *." (Carriers "subject to the Interstate Commerce Act" are those engaged in "[t]he transportation of passengers or property wholly by railroad * * *" (49 U.S.C. 1).) Section 151, Fifth, defines "employee" to include "every person in the service of a carrier * * * who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted * * *."

(a) The United States and the National Labor Relations Board submit that the court of appeals correctly held that the Railway Labor Act is inapplicable to Pan American's non-transportation activities at the Nevada test site. That conclusion follows from the language, design and purpose of the Act, which show that it should be limited to "transportation activities and that work which bears more than a tenuous, negligible, and remote relationship to the transportation activities" (*Jackson* v. *Northwest Airlines*, 70 F. Supp. 501, 513 (D. Minn.), quoted with approval by the Eighth Circuit in affirming, 185 F. 2d 74, 77).

The first of the Congressionally-declared purposes of the Act is: "To avoid any interruption to commerce or to the operation of any carrier engaged therein" (45 U.S.C. 151a). Similarly, the coverage for air carriers is to "every common carrier by air engaged in interstate or foreign commerce * * *" (45 U.S.C. 181)—a provision which "speaks only in terms of carriers and transportation activities"

(*Northwest Airlines, supra,* 70 F. Supp. at 507). Pan American, when performing housekeeping services at the Nevada test site, was not "engaged in interstate or foreign commerce." In holding that the Railway Labor Act was a constitutional exercise of the commerce power when applied to "back shop" employees, this Court stated: "It is the nature of the work done and *its relation to interstate transportation* which afford adequate basis for the exercise of the regulatory power of Congress" (*Virginian Railway v. System Federation No. 40,* 300 U.S. 515, 557, emphasis added).

While the Act applies to "any * * * carrier by railroad," in the case of a subsidiary company it applies only if the subsidiary "operates any equipment or facilities or performs any service * * * in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad" (45 U.S.C. 151, First). Thus, if the work which Pan American does at the Nevada test site had been performed by a wholly-owned subsidiary rather than by the carrier itself, the Act concededly would not apply. It would be most unusual if the determination of which federal labor statute applies should turn upon whether the carrier performs the service itself or through an intermediary.

Moreover, applying the Act to an air carrier's non-transportation services would lead to the unfortunate result that different federal statutes would govern labor relations involving the same work, and perhaps even the same employees, depending upon whether,

at the particular time, the contractor happened to be an air carrier. Indeed, in this very case the same work which Pan American now performs at the Nevada test site was performed prior to June 1963 by a commercial firm to which Railway Labor Act could not possibly have been considered applicable. A further anomalous result of applying the Railway Labor Act to such activities could be that two groups of employees performing the same work at the same installation, perhaps even in close physical proximity, would be covered by different federal statutes depending upon the particular contractor (carrier or non-carrier) for whom they happen to work. In sum, application of the Act to an air-carrier's non-transportation activities that are not related to its transportation operations might, in the long run, be more likely to disturb than to stabilize labor relations.

b. The National Mediation Board, however, is of the view that the Act does apply to Pan American's employees at the Nevada test site. It points to the fact that when Congress extended the Act to air carrier it made it applicable to "every common carrier by air engaged in interstate or foreign commerce * * * and every * * * person who performs any work as an employee or subordinate official of such carrier * * *." As the Board explained (Pet. App. A, 28a), in taking jurisdiction in 1956 over Pan American employees performing similar functions at Cape Canaveral: "The test is simple: Is the employer a common carrier by air engaged in interstate commerce? Does the individual perform any

work as an employee? If both answers are in the affirmative, the Board's jurisdiction is clear."

But even the literal language of the Act does not go as far as the Mediation Board would push it. For the Act is made applicable to air carriers "and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of 'carrier' and 'employee'" in the original Railway Labor Act. That Act, however, does not apply to all employees of a rail carrier but only to a person "who perform[s] any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted * * *" (45 U.S.C. 151, Fifth). More than 20 years ago the Interstate Commerce Commission, in holding that elevator operators, elevator starters and information clerks in an office and terminal building were not employees or subordinate officials of the carrier which owned the building, stated: "if the relation of the work of employees to the interstate activities of a carrier is remote, tenuous, and negligible, the Railway Labor Act does not apply to them". (*Hudson & M.R. Co. Employees*, 245 I.C.C. 415, 425 (1941)). Thus, the Interstate Commerce Commission itself has held that the Railway Labor Act only applies to non-transportation activities if the work performed has a significant connection with the carrier's transportation activities; the mere fact that a person is an employee of a rail carrier is not itself enough to bring him under the

Act.[2] A requirement of a functional relationship between the work performed and the carrier's transportation activities is also indicated by the specific limitation that, in the case of employees of a carrier's wholly-owned subsidiary, the Act applies only if the work is performed "in connection with" the carrier's transportation operations.

The Mediation Board supports its reading of the Act by noting that airline employees often do the same work at a non-transportation installation as they do in connection with transportation activities, and that such employees are interchanged between the two types of jobs; and urging that, unless the Act covers non-transportation activities, a labor dispute growing out of them might spread to a carrier's other operations and thus cause the very disruption of transportation which the Act was designed to avoid. To be sure, a labor union which has a dispute with an air carrier involving non-transportation activities might disrupt the carrier's flight operations by striking or picketing, in order to put pressure upon the carrier to settle the non-transportation dispute. In the present case, for example, the Transport Workers Union of America, AFL-CIO, is the exclusive bargaining representative for the classes of

[2] The Commission has not promulgated any definitions of employees or subordinate officials of air carriers and, indeed, on one occasion declined to do so. But these considerations are immaterial to our argument. For we rely on the Commission's action with respect to rail carriers only to show that mere employment by a carrier, without any functional relationship between the work performed and the carrier's transportation activities, is not enough to bring the employee under the Railway Labor Act.

employees who perform the work which Pan American does at the Nevada test site, and it has entered into a collective bargaining agreement with Pan American covering all of such employees within the continental United States. If, as a result of the decision below, Pan American were to attempt to negotiate a contract for its employees at the Nevada test site with another union, the Transport Workers Union might strike Pan American's transportation operations.

It seems doubtful, however, whether the possibility of such a "spill-over" of a labor dispute from non-transportation to transportation activities is the kind of interruption to commerce with which Congress was concerned and which it sought to prevent in the Railway Labor Act. Moreover, a similar "spill-over" would seem equally likely if the non-transportation operations were conducted by a carrier's wholly-owned subsidiary, yet in that case the Act plainly would not apply. If Congress had intended that the possibility of a "spill-over" would be enough to give the Mediation Board jurisdiction over an air carrier's non-transportation activities, it presumably would have given the Board jurisdiction where such activities are conducted by a wholly-owned subsidiary. More likely, it seems to us, is that the Act was intended to apply only to those non-transportation activities which have a significant functional relation to the transportation activities themselves.

The Mediation Board also points to its allegedly settled interpretation of the Act as covering employees of air carriers performing non-transportation

work. But this interpretation was first rendered in 1956 (in the *Cape Canaveral* case), twenty years after the Railway Labor Act was extended to air carriers; and the only other decision applying this interpretation has been the present case, which apparently was decided on the authority of the 1956 decision. Indeed, as we have already noted, the Interstate Commerce Commission has taken the contrary view in interpreting the Railway Labor Act as applied to rail carriers. And while the National Labor Relations Board has in recent years deferred to the Mediation Board's assumption of jurisdiction without inquiring into the question its earlier decisions tend to support the view that the Labor Board and not the Mediation Board has jurisdiction in the present situation.[4]

Accordingly, the Solicitor General believes that the decision below is correct. If certiorari should be granted, he would present the opposing considerations but support affirmance of the court of appeals.

2. THE IMPORTANCE OF THE CASE

Both the Labor Board and the Mediation Board would like a definitive ruling upon the jurisdictional question presented by this case without waiting to see whether other circuits will accept the decision of the Ninth Circuit or a conflict will develop. There is likelihood of further litigation because a ruling in favor of Mediation Board jurisdiction would advance the claims of the Transport Workers Union and other

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[4] *Pan American World Airways*, 115 N.L.R.B. 493.

[5] *Northwest Airlines, Inc.*, 47 N.L.R.B. 498, 51 N.L.R.B. 1012; *Northern Pacific Transport Company*, 89 N.L.R.B. 1561; see, also, *Northern Redwood Lumber Co.*, 88 N.L.R.B. 272.

labor unions which customarily represent railroad and airline employees, whereas Labor Board jurisdiction would be considered advantageous to the jurisdictional claims of rival labor organizations, such as those which represented the employees at the Nevada installation before Pan American took over the government contract.[5] The decision of the District Court for the District of Columbia in *Biswanger* v. *Boyd*, 32 C.C.H. Labor Cases, par. 70,840, upholding the Mediation Board's assumption of jurisdiction over Pan American's employees at Cape Kennedy in 1956, gives encouragement to the former view.

The issue, on the other hand, is very narrow. Pan American is the only employer, subject in some of its operations to the Railway Labor Act, which presently has contracts with the Atomic Energy Commission or other government agencies to do work of a kind normally subject to National Labor Relations Board jurisdiction. Pan American's major contract is at Cape Kennedy, Florida (where it has 6,000 employees), but it also has smaller contracts at Fort Huachuca, Arizona (with 500 employees) and Fort McGregor, Texas (with about 50 employees). Trans World Airlines announced on February 10, 1964, that it had been selected by the National Aeronautics and Space Administration to perform similar maintenance work at the latter's large-scale facility at Merritt Island, Florida, which is adjacent to Cape

[5] There are pending before the Labor Board petitions filed by various non-transportation labor organizations seeking certification as the representatives of various Pan American employees at the Nevada test site.

Kennedy; and that it would negotiate a contract for such work with that agency (New York Times, February 11, 1964, p. 69M, col. 1). While Trans World Airlines has an established bargaining relationship under the Railway Labor Act with the International Association of Machinists, AFL–CIO, there is no establishing bargaining relationship covering its proposed services at Merritt Island.

The only claim of the present case to importance, in the opinion of the Solicitor General, is its potential impact upon operations at Cape Kennedy. Since 1956, Pan American has engaged in collective bargaining with representatives of its employees on the assumption that the Railway Labor Act applies, and labor relations between Pan American and its employees have been stabilized.[6] An ultimate ruling in favor of Labor Board jurisdiction might have a disturbing effect because it might open the door to renewed inter-union rivalry. Uncertainty as to whether the decision below will be followed in the Fifth Circuit—the circuit with jurisdiction over Cape Kennedy and the only other circuit in which operations similar to those at Las Vegas are located—might be something of an unstabilizing influence. These potential consequences, however, are speculative and seem more related to the merits than the current importance of the controversy.

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[6] The current dispute arising out of a strike against the Florida East Coast Railway is not related to, nor affected by, any issue in the present case.

CONCLUSION

While the decision below might lead to significant labor unrest at one highly important government installation and might cause a slight amount of further litigation, the United States does not believe that review by this Court is warranted. The decision of the court of appeals is correct; its reach is limited; and the issue does not appear to be of sufficient importance in the field of labor management relations to call for a resolution by this Court in the absence of a conflict. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

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